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## Libertarian Patriarchalism: Nudges, Procedural Roadblocks, and Reproductive Choice

Govind Persad

*Georgetown University*, [gcp11@georgetown.edu](mailto:gcp11@georgetown.edu)

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# LIBERTARIAN PATRIARCHALISM: NUDGES, PROCEDURAL ROADBLOCKS, AND REPRODUCTIVE CHOICE

Govind Persad\*

## INTRODUCTION

Cass Sunstein and Richard Thaler's proposal that social and legal institutions should steer individuals toward some options and away from others—a stance they dub “libertarian paternalism”<sup>1</sup>—has provoked much high-level discussion in both academic and policy settings.<sup>2</sup> Sunstein and Thaler believe that steering, or “nudging,” individuals is easier to justify than the bans or mandates that traditional paternalism involves.<sup>3</sup>

This Article considers the connection between libertarian paternalism and the regulation of reproductive choice. I first discuss the use of nudges to discourage women from exercising their right to choose an abortion, or from becoming or remaining pregnant. I then argue that reproductive choice cases illustrate the limitations of libertarian paternalism. Where choices are politicized or intimate, as reproductive choices often are, nudges become not much easier to justify than traditional mandates or prohibitions. Even beyond the context of reproductive choice, it is not obvious how much easier nudges are to justify than bans or mandates.

Part I of this Article briefly introduces Sunstein and Thaler's libertarian paternalism. Part II then turns to the context of reproductive choice. Part

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\* J.D., Stanford Law School; Visiting Scholar, University of Pennsylvania, 2013-14; Ph.D. Candidate, Philosophy, Stanford University. Thanks to Barbara Fried, Richard Craswell, Hank Greely, Linda Bosniak, Kim Shayo Buchanan, and audience members at the *Beyond Roe: Reproductive Justice in a Changing World* Conference at Rutgers-Camden Law School and at the UCLA Graduate Conference on Law and Philosophy for helpful discussion.

<sup>1</sup> Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003); see also RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008); CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* (2013).

<sup>2</sup> See, e.g., *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2307 (2012) (Breyer, J., dissenting) (citing Sunstein and Thaler's work on nudges); Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 MICH. L. REV. 913, 914, 924 n.4 (2010) (noting “the announcement by Peter Orszag, head of the OMB, endorsing Cass Sunstein's approach”).

<sup>3</sup> Sunstein & Thaler, *supra* note 1, at 1162.

II.A reviews restrictions on the right to choose an abortion—particularly post-*Casey* regulations such as waiting periods, requirements that women receive certain types of information, and requirements that women undergo ultrasound—that pitch themselves as steering choice without entirely closing off the right to choose an abortion. This distinction between nudges and prohibitions echoes Sunstein and Thaler's proposals, but works to subordinate women's choices to the judgment of (often male) experts and administrators—hence my term “libertarian patriarchalism.” Part II.B reviews efforts to nudge women—particularly teenagers, HIV-positive women, and others thought to be unsuitable mothers—to avoid pregnancy.

Part III considers the normative implications of nudging reproductive decisions. In Part III.A, I argue that the *political* nature of reproductive choices presents a problem for nudges. I do so by considering a parallel with voting rights. Empirical research shows that voters are more likely to choose the candidate listed first on the ballot.<sup>4</sup> Yet we do not empower the administrator in charge of ballot design to choose a default rule that nudges individuals toward the candidate he sincerely believes would promote choosers' welfare. Given the political nature of reproductive choices, a policymaker's attempting to nudge reproductive decisionmaking in the direction he prefers—or indeed in any direction—fails to show adequate respect for the chooser's agency. In Part III.B, I offer an argument that targets the use of nudges in the context of pregnancy. Finally, in Part III.C, I argue that nudges do not merely add choices to an existing menu, but change the substantive choices available to individuals and thereby impose more-than-trivial costs on them. I conclude by exploring the implications of my arguments for nudges more generally.

This Article does not examine every facet of Sunstein and Thaler's proposal, nor does it argue that libertarian paternalism—even in the reproductive choice context—is never acceptable. Some have criticized Sunstein and Thaler's view for failing to accord with a robustly libertarian account of choice, and so as unsuccessful in its goal of offering an internal critique of a libertarian perspective.<sup>5</sup> I do not engage that debate here. Others have criticized Sunstein and Thaler for a mistaken understanding of our cognitive psychology: many of these critics argue that attitudes that Sunstein and Thaler describe as cognitive biases are in fact understandable, justifiable, and defensible on normative grounds.<sup>6</sup> I have offered such a criticism elsewhere.<sup>7</sup> Here, I merely aim to show both that libertarian

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<sup>4</sup> See Jon A. Krosnick, *In the Voting Booth, Bias Starts at the Top*, N.Y. TIMES (Nov. 4, 2006), <http://www.nytimes.com/2006/11/04/opinion/04krosnick.html>.

<sup>5</sup> E.g., Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245, 1248 (2005).

<sup>6</sup> E.g., Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907, 1961-63, 2005-11 (2002).

<sup>7</sup> Govind Persad, *When, and How, Should Cognitive Bias Matter to Law?* 32 LAW. & INEQ. 31, (2014).

paternalism faces distinctive problems when applied to reproductive choices and that these problems suggest grounds for doubt about its applicability in other contexts.

### I. LIBERTARIAN PATERNALISM, IN BRIEF

Sunstein and Thaler explain libertarian paternalism using the following example:

[C]onsider the cafeteria at some organization. The cafeteria must make a multitude of decisions, including which foods to serve, which ingredients to use, and in what order to arrange the choices. Suppose that the director of the cafeteria notices that customers have a tendency to choose more of the items that are presented earlier in the line. How should the director decide in what order to present the items?<sup>8</sup>

Sunstein and Thaler argue that the director should order the items with a view to promoting patrons' health.<sup>9</sup> Such an ordering constitutes paternalism as Sunstein and Thaler define it, since it "attempts to influence the choices of affected parties in a way that will make choosers better off."<sup>10</sup> But Sunstein and Thaler contend that their proposal raises no normative concerns.<sup>11</sup> This is so for two reasons. First, the patrons have no stable preferences for a different ordering.<sup>12</sup> Second, a paternalistic ordering of items still permits a patron to choose or reject any item in the line.<sup>13</sup>

Sunstein and Thaler assert that libertarian paternalism is not coercive: "the choice of the order in which to present food items does not coerce anyone to do anything[.]"<sup>14</sup> But evaluating this claim requires a definition of coercion, which Sunstein and Thaler omit. On one influential conception of coercion, Alan Wertheimer's "moralized baseline" view, whether libertarian paternalism coerces depends not merely on whether it *restricts* anyone's *options*—as charging a price for a doughnut at the supermarket also does<sup>15</sup>—but whether it *violates* anyone's *rights*.<sup>16</sup> As such, arguing

<sup>8</sup> Sunstein & Thaler, *supra* note 1, at 1164.

<sup>9</sup> *Id.* at 1165.

<sup>10</sup> *Id.* at 1162.

<sup>11</sup> *Id.* at 1163 n.17.

<sup>12</sup> *Id.* at 1164 ("Across a certain domain of possibilities, consumers will often lack well-formed preferences, in the sense of preferences that are firmly held and preexist the director's own choices about how to order the relevant items. If the arrangement of the alternatives has a significant effect on the selections the customers make, then their true 'preferences' do not formally exist.").

<sup>13</sup> *Id.* at 1164-65.

<sup>14</sup> *Id.* at 1165.

<sup>15</sup> Cf. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1446-47 (1989).

<sup>16</sup> See ALAN WERTHEIMER, COERCION 217 (1987); Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440, 463 (Sidney Morgenbesser et al. eds. 1969) (proposing a similar account). But see Mark Kelman, *Thinking About Sexual Consent*, 58 STAN. L. REV. 935, 964 (2005) (book review) (criticizing Wertheimer's account).

that libertarian paternalism doesn't violate anyone's rights because it doesn't coerce gets things backward, since knowing whether it coerces would require first knowing whether it violates rights.

Rather than claiming that libertarian paternalism does not coerce, Sunstein and Thaler would do better to rely on a different claim they make, that libertarian paternalism is not burdensome:

Libertarian paternalism is a relatively weak and nonintrusive type of paternalism, because choices are not blocked or fenced off. In its most cautious forms, libertarian paternalism imposes trivial costs on those who seek to depart from the planner's preferred option.<sup>17</sup>

We might understand this claim as asserting that libertarian paternalism imposes a *default* rule rather than a *mandatory* rule. The rule is default rather than mandatory because choosers may easily opt for a different rule.<sup>18</sup>

Choosing *some* default rule is inevitable, and any default rules will tend to affect the options chosen. But a variety of potential default rules are possible. Sunstein and Thaler recommend default rules that promote the chooser's welfare as the administrator understands it.<sup>19</sup> But other options—ones Sunstein and Thaler ignore—include “penalty default[s]” that aim to force active choice;<sup>20</sup> defaults that promote other ends, such as equality or liberty;<sup>21</sup> defaults that aim to track the pre-choice preferences of most choosers, to the extent that these preferences exist;<sup>22</sup> and defaults that aim to ensure (via, for instance, randomization) that the chooser is not subject to systematic influence by the administrator.<sup>23</sup>

## II. NUDGES AND THE REGULATION OF REPRODUCTIVE CHOICE

In this Part, I lay the descriptive groundwork for Part III's normative criticism of Sunstein and Thaler's view. In Part II.A, I discuss recent regulations that make it more challenging to choose abortion while not altogether blocking that choice, and note that these regulations have many features of the nudges Sunstein and Thaler endorse. Part II.B similarly

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<sup>17</sup> Sunstein & Thaler, *supra* note 1, at 1162.

<sup>18</sup> *Id.* at 1199 (“So long as people can contract around the default rule, it is fair to say that the legal system is protecting freedom of choice, and in that sense complying with libertarian goals.”).

<sup>19</sup> *Id.* at 1162.

<sup>20</sup> See, e.g., Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 832-33 (2007) (suggesting that a system that defaults marrying couples into a “meaningless and unappealing (and unpronounceable) name could jar them to think more creatively and deliberate more fully on alternatives to her taking his name”).

<sup>21</sup> See, e.g., Matthew A. Smith & Michael S. McPherson, *Nudging for Equality: Values in Libertarian Paternalism*, 61 ADMIN. L. REV. 323, 330-39 (2009).

<sup>22</sup> See, e.g., Sunstein & Thaler, *supra* note 1, at 1194 (“[T]he libertarian paternalist might select the approach that the majority would choose if explicit choices were required and revealed.”) (emphasis omitted).

<sup>23</sup> See *infra* Part III.A.

reviews recent efforts to nudge women away from pregnancy, and notes parallels between these efforts and libertarian-paternalist proposals.

### A. Anti-Abortion Nudges

Since *Casey*, a wide variety of regulations that affect a woman's right to choose an abortion have been proposed and upheld on the basis that they do not prohibit women from exercising this right, but instead ensure that a woman's consent to abortion is appropriately informed, or encourage women—without forcing them—to reconsider.<sup>24</sup> Such regulations include requirements that women seeking abortion observe a waiting period; receive counseling; receive information about fetuses' legal or moral status; view an ultrasound; and/or hear a fetus's heartbeat.<sup>25</sup> Pre-*Casey* restrictions, such as the exclusion of abortion from state and federal medical coverage, were also upheld on the basis that they nudged women away from abortion without abrogating their right to choose.<sup>26</sup> (Private actors like fertility clinics have also adopted techniques designed to encourage women to identify and connect psychologically with embryos

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<sup>24</sup> See *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 877-78 ("What is at stake is the woman's right to make the ultimate decision, *not a right to be insulated from all others in doing so*. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.") (citation omitted) (emphasis added); see also *Isaacson v. Horne*, 884 F. Supp. 2d 961, 969 (D. Ariz. 2012) ("[A] corollary proposition in this case is that, while H.B. 2036 may prompt a few women, who are considering abortion as an option, to make the ultimate decision earlier than they might otherwise have made it, H.B. 2036 is nonetheless constitutional *because it does not 'prohibit any woman from making the ultimate decision to terminate her pregnancy.'*") (citations omitted) (emphasis added); cf. James E. Fleming, *Taking Responsibilities as Well as Rights Seriously*, 90 B.U. L. REV. 839, 839-40 (2010) (noting that the late Ronald Dworkin "countenanced that government may encourage women to take the decision whether to have an abortion responsibly, so long as it does not compel conformity with its view of the responsible decision").

<sup>25</sup> Numerous articles have ably reviewed the myriad abortion restrictions proposed and enacted post-*Casey*. The most current and comprehensive of these are: Sonia M. Suter, *The Politics of Information: Informed Consent in Abortion and End-of-Life Decision Making*, 39 AM. J.L. & MED. 7, 23-30 (2013) (discussing abortion regulations that mandate the disclosure of inaccurate medical information, the provision of statements about fetal moral status, the receipt of printed material about abortion alternatives, and the viewing of ultrasound images); Ian Vanderwalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 13-33 (2012) (discussing how abortion regulations require the provision of misleading statements about risk, irrelevant medical information, and false information about fetal pain; require physicians to describe ultrasounds and make the fetal heartbeat audible; and impose waiting periods of up to seventy-two hours); Nadia N. Sawicki, *The Abortion Informed Consent Debate: More Light, Less Heat*, 21 CORNELL J. L. & PUB. POL'Y 1, 6-10 (2011) (discussing required discussion about risks, required disclosure of gestational age, mandatory ultrasound, information about abortion alternatives, and mandatory waiting periods).

<sup>26</sup> E.g., *Maher v. Roe*, 432 U.S. 464, 475 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.").

and fetuses.)<sup>27</sup> And, perhaps most striking, the very idea that a woman's choice to have an abortion could be stable or could preexist her encountering the state's regulatory apparatus has been challenged: the Court based *Gonzales v. Carhart's* prohibition of late-term abortions in part on the claim that "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."<sup>28</sup>

A few commentators have noted, though not deeply explored, the connection between abortion restrictions and Sunstein and Thaler's libertarian paternalism.<sup>29</sup> In particular, Matthew Smith and Michael McPherson consider whether waiting periods for abortion are "an example of choice architecture that can promote substantive liberty."<sup>30</sup> Ian Ayres makes the similar point that waiting periods and counseling requirements can be viewed as "altering rules"—rules that determine when individuals may deviate from a default rule—and that they resemble cooling-off periods elsewhere in law, though Ayres concludes that "[t]he translation into altering-speak . . . adds little value in determining whether the restrictions are unconstitutionally infirm."<sup>31</sup> And Jessica Berg notes

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<sup>27</sup> Jody Lynecé Madeira, *Conceivable Changes: Effectuating Infertile Couples' Emotional Ties to Frozen Embryos Through New Disposition Options*, 79 UMKC L. REV. 315, 319-20 (2010) ("Consistent with their own commercial interests, the fertility industry acknowledges and even fosters the formation of emotional attitudes towards frozen embryos. A page on the website of the American Fertility Association addressing prospective embryo donors states, '[a]t either end of the [assisted reproductive technologies] outcome spectrum, there are former patients, like you, wrestling with the emotionally-laden decision of what to do with the cryogenically preserved embryos they gave so much to create but will never use.' Fertility clinics foster emotional connection to embryos by giving intended mothers pictures of transferred embryos and by encouraging them to watch the transplantation procedure on an ultrasound screen—and perhaps even giving them an ultrasound picture of the newly transferred embryos 'at home' in the uterus.").

<sup>28</sup> *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

<sup>29</sup> See, e.g., William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1893 (2012) (noting the shift away from explicit state coercion toward "guided choice" or "gentle nudges" in family law, including the law of abortion); Leandro Martins Zanitelli, *Default Rules and the Inevitability of Paternalism*, (May 27, 2009) (Latin Am. & Caribbean Law & Econ. Ass'n (ALACDE) Annual Papers, available at <http://escholarship.org/uc/item/36j091s8>, at 8 ("Can a statute conditioning the right to abortion on a waiting time and a sequence of embarrassing meetings be cited as an example of soft paternalism just because the final word about interrupting pregnancy is still left to women?").

<sup>30</sup> Smith & McPherson, *supra* note 21, at 333.

<sup>31</sup> Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2110 (2012) ("One can consider statutes that mandate that women be given counseling before an abortion as a kind of altering rule. Under this reading, the mandated counseling is a necessary (altering) prerequisite to the woman's ability to opt out of the no abortion default. Under the *Casey* standard, one can ask whether the purpose or effect of the counseling requirement is to impede or merely to assure that abortion consent is fully informed. Through the altering lens, it is easy to see that many of the abortion statutes track the strategies (including cooling-off periods) discussed above. The translation into altering-speak, however, adds little value in determining whether the restrictions are constitutionally infirm.").

descriptively that pre-*Casey* restrictions on abortion funding for Medicaid recipients might draw support from libertarian paternalist arguments.<sup>32</sup>

Some commentators not only note the connections between libertarian paternalism and restrictions on reproductive choice but regard libertarian paternalism as providing persuasive support for these restrictions.<sup>33</sup> Josh Patashnik argues that proposed laws requiring psychological evaluation of women seeking abortions and requiring that women be given an opportunity “to view an ultrasound and feel the fetus’s heartbeat” are merely a simple extension of Sunstein and Thaler’s view: rather than being “inherently sexist or condescending[,]” such laws “nudge[e] women to make sure they realize abortion is a complicated moral question and a step not to be taken lightly[,]” and constitute “an unobtrusive, reasonable way for the state to emphasize the nature of fetal life without constraining choice.”<sup>34</sup> And, in a 2013 online exchange, George Mason University’s Bryan Caplan argued that “there is . . . a simple libertarian paternalist case against abortion[,]” which rests on childless adults’ frequent regret about not having children, and that, in light of the phenomenon of regret, libertarian paternalists should embrace waiting periods, opt-out counseling, and requiring abortion providers to practice only in inconvenient locations.<sup>35</sup> Although Caplan goes less far than the Court did in *Gonzales* as he uses regret as a justification for a nudge rather than an outright prohibition, his regret-based rationale for restrictions on abortion parallels the Court’s reasoning in *Gonzales*.<sup>36</sup>

Finally, two recent proposals that aim to discourage women from terminating pregnancies that will lead to the birth of a disabled child appeal to libertarian-paternalist justifications. Samuel Bagenstos argues that libertarian paternalism and disability rights perspectives both support the imposition of information requirements on women in order to promote better-informed choice about whether to terminate pregnancies.<sup>37</sup> Elizabeth

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<sup>32</sup> See Jessica Berg, *All for One and One for All: Informed Consent and Public Health*, 50 HOUS. L. REV. 1, 28 n.142 (2012) (noting that the use of differential funding enables states to make childbirth the more attractive choice).

<sup>33</sup> See *infra* notes 34–35.

<sup>34</sup> Josh Patashnik, *Is Soft Paternalism a Middle Ground on Abortion?* THE NEW REPUBLIC (Apr. 29, 2008), <http://www.newrepublic.com/blog/the-plank/soft-paternalism-middle-ground-abortion>.

<sup>35</sup> Bryan Caplan, *Nudge and Abortion*, LIBRARY OF ECON. & LIBERTY (Aug. 12, 2013), [http://econlog.cconlib.org/archives/2013/08/nudge\\_and\\_abort.html](http://econlog.cconlib.org/archives/2013/08/nudge_and_abort.html); see also Bryan Caplan, *Nudge and Abortion Followup*, LIBRARY OF ECON. & LIBERTY (Aug. 13, 2013), [http://econlog.cconlib.org/archives/2013/08/nudge\\_and\\_abort\\_1.html](http://econlog.cconlib.org/archives/2013/08/nudge_and_abort_1.html) (“Women who want abortions often expect having the child to be a disaster, even though women who carry unwanted pregnancies to term very rarely see it that way. This big divergence between ex ante assumption and ex post experience is a golden opportunity for nudging to ultimately make people better off in their own eyes.”).

<sup>36</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

<sup>37</sup> Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 HARV. J.L. & GENDER 425, 443–44 (2006) (“To the extent that the disability rights critics have sought to regulate individuals’ choices . . . they have justified their regulatory proposals as serving, rather than undermining, freedom of choice.



Emens proposes that doctors provide all parents seeking testing with information that conveys what she calls the “inside perspective” on disability—the perspective of people with disabilities and their parents—with the aim of ensuring that parents’ choices about how to respond to their test results are better informed.<sup>38</sup> Interestingly, both Emens and Bagenstos emphasize the instability of parents’ preferences: both draw on social science that purports to show that parents have different judgments about the severity of the burdens involved in raising a disabled child *ex post* (once they are raising the child) than individuals who are not raising children do.<sup>39</sup>

The above applications of nudging to reproductive choice raise the question of whether Sunstein and Thaler themselves regard nudges as appropriate or inappropriate in the abortion context. Sunstein, despite his work elsewhere defending the right to choose an abortion,<sup>40</sup> does not unequivocally reject nudging in the abortion context. In a recent article, he argues that

graphic warnings do not override individual choice, and while they are not neutral and are meant to steer, people can ignore them if they want. We can easily imagine, and even find, graphic warnings that are meant to discourage texting while driving, abortion, premarital sex, and gambling. However powerful, any such warnings can be ignored. Those who run cafeterias and grocery stores might place fruits and vegetables at the front and cigarettes and fatty foods at the back. Even if so, people can always go to the back.<sup>41</sup>

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Regulation is necessary, disability rights critics have argued, to provide a counterbalance to the strong social forces that will otherwise lead people to accord less value to the lives and potential lives of individuals with disabilities. By counteracting a coercive social setting, regulation helps to assure that the choices made in this context are authentic exercises of an individual’s will.”); *id.* at 444 n.99 (“The prescription of the disability rights critics has a strong affinity with recent scholarship that proposes one or another form of avowedly paternalistic regulation that does not foreclose choice altogether, but is designed to help people avoid making choices they will regret.”).

<sup>38</sup> Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1417 (2012) [hereinafter *Framing Disability*].

<sup>39</sup> See *id.* at 1394 (“Families of children with physical and cognitive disabilities may . . . be happier than outsiders would expect[.]”); Bagenstos, *supra* note 37, at 447 n.115 (“The [Casey] joint opinion’s analysis on this point [supporting informed consent requirements] might draw some support from advocates of ‘asymmetric’ and ‘libertarian’ paternalism. Those advocates contend that individuals ‘are especially prone to making choices that they will regret’ when they ‘are making decisions that they make infrequently and for which they therefore lack a great deal of experience’ and when ‘emotions are likely to be running high.’ Abortion decisions readily seem to fit that paradigm.”) (quoting Sunstein & Thaler, *supra* note 1, at 1188 and Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1212 (2003)).

<sup>40</sup> See Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 39 (1992) (“The argument for an abortion right built on principles of sex equality is thus straightforward. Restrictions on abortion burden only women, and are therefore impermissible unless persuasively justified in sex-neutral terms.”).

<sup>41</sup> Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1893 (2013) [hereinafter *Behavioral Economics*].

Sunstein's view suggests that even if an ultrasound image is being placed in a woman's line of sight, as a recent Oklahoma statute proposed,<sup>42</sup> her ability to turn away means that her choice has not genuinely been overridden. In contrast, Thaler, though he has not discussed information requirements, has argued (in response to Bryan Caplan's argument, discussed above) that libertarian paternalism does not justify limiting Medicaid funding of abortions.<sup>43</sup>

### *B. Anti-Pregnancy Nudges*

In March 2013, New York City launched a media campaign to discourage teen pregnancy: the campaign featured "subway and bus shelter ads in all five boroughs; an interactive texting program featuring facts, games and quizzes; and a YouTube video engaging teens on the subject."<sup>44</sup> The billboards and interactive programming aimed to directly and persuasively confront teens with the negative consequences of becoming pregnant:

HRA's Teen Pregnancy Prevention campaign, which aims to increase awareness of the consequences of early pregnancy, feature photos of babies, confronting the viewer with strong facts about the challenges teen parents face (some examples: "Honestly, mom . . . chances are he won't stay with you. What happens to me?" and "Dad, you'll be paying to support me for the next 20 years.") . . .

. . .

The campaign's texts, developed by HRA in partnership with digital cause strategy company Whole Whale using mobile technology company Mobile Commons' platform, will feature facts on the hard realities of teen parenthood and the benefits of delaying pregnancy, along with games and quizzes where participants can simulate the choices facing teen parents and test what they have learned. The final component of the campaign is a video PSA to be released on YouTube in late March, and features a baby "confronting" young teens on the cost of taking care of a child.<sup>45</sup>

Although the campaign presents facts, it does so via the persuasive visual device of presenting them as spoken by infants suffering the negative consequences of having been born to teen parents (Figure 1).


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<sup>42</sup> See Vanderwalker, *supra* note 25, at 29 (discussing OKLA. STAT. tit. 63, § 1-738.3d(B)(3) (2011)).

<sup>43</sup> See Richard H. Thaler, TWITTER (Aug. 12, 2013, 11:03 AM), [https://twitter.com/R\\_Thaler/statuses/366983350545694722](https://twitter.com/R_Thaler/statuses/366983350545694722) (rejecting Bryan Caplan's argument that we should employ funding restrictions to nudge women away from seeking abortions on the basis that such a nudge would disproportionately affect abortion access for poor women).

<sup>44</sup> Press Release, Office of the Mayor, City of New York, Mayor Bloomberg, Deputy Mayor Gibbs and Human Resources Administration Commissioner Doar Announce New Campaign to Further Reduce Teen Pregnancy (Mar. 3, 2013), *available at* <http://www1.nyc.gov/office-of-the-mayor/news/082-13/mayor-bloomberg-deputy-mayor-gibbs-human-resources-administration-commissioner-doar-announce> [hereinafter Press Release, Office of the Mayor].

<sup>45</sup> *Id.*



I'm twice  
as likely **not**  
to graduate  
high school  
because  
you had me  
as a teen.

**KIDS OF TEEN MOMS ARE TWICE AS LIKELY NOT TO GRADUATE THAN KIDS WHOSE MOMS WERE OVER AGE 22.**

Text 'NOTROW' to 877877 for the real price of teen pregnancy.  
Don't let statistics tell you City does what you need to do.

**NYC** Department of Health & Mental Hygiene

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Both the Deputy Mayor and the Human Resources Administration Commissioner employed libertarian-paternalist language in explaining the campaign's goal, asserting that "this campaign is designed to help teens think through the real-life costs of teen pregnancy and guide them toward healthier decisions[.]" and that although "[w]e cannot dictate how people live their lives . . . we must encourage responsibility and send the right message, especially to young people."<sup>47</sup>

The New York City campaign's denial that it limits choice combined with a clear desire to change behavior identifies it as an example of libertarian paternalism.<sup>48</sup> And, indeed, a *New York Times* editorial praising the campaign asserts that shame "acts as a form of moral regulation, or

<sup>46</sup> See Kate Taylor, *Posters on Teenage Pregnancy Draw Fire*, N.Y. TIMES (Mar. 6, 2013), [www.nytimes.com/2013/03/07/nyregion/city-campaign-targeting-teenage-pregnancy-draws-criticism.html?\\_r=0](http://www.nytimes.com/2013/03/07/nyregion/city-campaign-targeting-teenage-pregnancy-draws-criticism.html?_r=0) (discussing criticism of the HRA campaign's use of images of infants).

<sup>47</sup> See Press Release, Office of the Mayor, *supra* note 44.

<sup>48</sup> Cf. *Freedom to Make the Right Choice*, 15 HEDGEHOG REV. 67, 67 (2013), available at [http://www.iasc-culture.org/THR/archives/Summer2013/ShortTakes\\_lo.pdf](http://www.iasc-culture.org/THR/archives/Summer2013/ShortTakes_lo.pdf) ("On the one hand, 'we cannot dictate how people live their lives,' to quote a New York City official commenting on the city's 'new and dynamic' public information campaign to address the problem of teen pregnancy. On the other hand, according to the same official, 'we must encourage responsibility and send the right message.' So people must have choices, but not all the choices that people make are the 'responsible' ones. The conundrum for public authorities is how to persuade people to exercise their freedom by making the choices the public authorities want them to make. This sort of pedagogy requires considerable subterfuge, as illustrated by the City's new teen pregnancy prevention campaign. . . . In the ads, what the city wants and what every teen should want and choose turn out to be the same thing. No one has ostensibly dictated how people live or constrained the range of choices teens might make (at their own risk). All the city has done is specify the 'right choice,' the good and responsible choice that every rational teen can see, indeed he or she already knows, to be the truth of the matter.").

social ‘nudge,’ encouraging good behavior while guarding individual freedom.”<sup>49</sup>

Yale School of Public Health lecturer Erika Christakis, meanwhile, has argued for an alternative way of nudging potential teen mothers: rather than spending money on persuasive advertising, we should simply pay teens not to get pregnant.<sup>50</sup> Sunstein and Thaler themselves also explicitly endorse payment-based nudges aimed at discouraging teen pregnancy.<sup>51</sup>

Some adult women, such as HIV-positive women, drug addicts, and welfare recipients, have also faced “nudging” efforts that discourage them from choosing pregnancy. Taunya Banks notes that, in 1988, the American College of Obstetricians and Gynecologists recommended that “obstetricians and gynecologists should discourage HIV-positive women from becoming pregnant.”<sup>52</sup> Women receiving public benefits have been subjected to efforts to discourage them from becoming or remaining pregnant,<sup>53</sup> and these efforts have been praised for their efforts to pair procreative rights with correlative responsibilities.<sup>54</sup> And women addicted to drugs have been offered financial incentives to choose sterilization or contraception.<sup>55</sup> Although these efforts involve financial *penalties* for pregnancy, rather than *bonuses* for nonpregnancy, they share the same core

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<sup>49</sup> Richard V. Reeves, Op-Ed., *Shame Is Not a Four-Letter Word*, N.Y. TIMES (Mar. 15, 2013), available at <http://www.nytimes.com/2013/03/16/opinion/a-case-for-shaming-teenage-pregnancy.html>. [Reeves is a nonresident senior fellow at the Brookings Institution].

<sup>50</sup> Erika Christakis, *Want to Prevent Teen Pregnancy? Pay Teens Not to Get Pregnant*, TIME (Mar. 12, 2013), available at <http://ideas.time.com/2013/03/12/want-to-prevent-teen-pregnancy-pay-teens-not-to-get-pregnant/> (“[I]f we want to get serious about values, we might try an approach with a much more successful track record of behavior change: paying teenagers not to get pregnant. For every person who makes it to age 21 without becoming pregnant or impregnating someone else, the government should dip into the funds we’d otherwise spend caring for infants and teen moms and instead pay a significant cash bonus directly to the young person.”).

<sup>51</sup> THALER & SUNSTEIN, *supra* note 1, at 234 (discussing and endorsing a program that pays teens one dollar for every day they avoid becoming pregnant).

<sup>52</sup> Taunya Lovell Banks, *The Americans with Disabilities Act and the Reproductive Rights of HIV-Infected Women*, 3 TEX. J. WOMEN & L. 57, 62 n.29 (1994).

<sup>53</sup> Martha F. Davis, *The Child Exclusion in a Global Context*, 60 CASE W. RES. L. REV. 1183, 1186 (2010) (“[S]tate legislatures have consistently cited the desire to constrain welfare recipients’ childbearing decisions.”); Lucy A. Williams, Essay, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 736–41 (1992) (discussing and criticizing public benefit restrictions that aim to discourage the birth of children to women on welfare).

<sup>54</sup> Suzanna Sherry, *Public Values and Private Virtue*, 45 HASTINGS L.J. 1099, 1103–04 (1993) (“[L]egal scholarship, which should be more balanced, similarly privileges rights over responsibility. A recent article in the Yale Law Journal laments welfare reforms designed to discourage unwed teenage parenthood as wrongly penalizing those who do not ‘conform to majoritarian middle-class values,’ and an article in the Wisconsin Law Review argues that a woman whose job is to encourage teenagers to avoid pregnancy in favor of more constructive life choices has the right to keep her job even if she chooses to have an illegitimate child.”) (quoting Williams, *supra* note 53, at 720–21 and citing Regina Austin, *Sapphire Bound!*, WIS. L. REV. 539, 550–76 (1989)).

<sup>55</sup> See Jayne Lucke, *Context Is All Important in Investigating Attitudes: Acceptability Depends on the Nature of the Nudge, Who Nudges, and Who Is Nudged*, 13 AM. J. BIOETHICS 24, 24 (2013) (discussing “Project Prevention . . . an organization that offers US\$300 to addicted individuals who agree to either undergo surgical sterilization or use long-acting forms of contraception”).

purpose and effect as Christakis's proposal to pay teens not to become pregnant. Both penalties and bonuses aim to discourage pregnancy by making pregnant women's financial situation worse than that of similarly situated nonpregnant women.

### III. CRITICIZING NUDGES

Part II provided a *descriptive* overview of the current regulatory regime surrounding reproductive decisionmaking and the connection between this regime and libertarian paternalism. Building on that groundwork, Part III will evaluate the *normative* justifications of libertarian-paternalist policies in the reproductive choice context. In Part III.A, I argue that attempts to "nudge" choosers exercising political agency are recognized to be inappropriate, and that reproductive choices involve the exercise of political agency. In Part III.B, I argue that reproductive choices lie within an intimate and personal domain where individuals should decide in light of their own values rather than in light of their beliefs about the public interest. In Part III.C, I argue that rather than merely placing restrictions on an existing menu of choices, libertarian-paternalist policies replace existing choices with new ones, altering the option sets both of women who choose as the policies would have them do and women who reject the libertarian paternalist's preferred choice.

#### A. Polling Places, Abortion Clinics, and Political Agency

Return to Sunstein and Thaler's original cafeteria example.<sup>56</sup> After proposing that the cafeteria director decide with an eye to customers' welfare, Sunstein and Thaler consider the possibility that the cafeteria director could "make choices at random,"<sup>57</sup> but pooh-pooh it as an absurd suggestion, classing it with the next option they propose, that of "choos[ing] those items that she thinks would make the customers as obese as possible."<sup>58</sup> Randomness, they seem to believe, has nothing going for it.<sup>59</sup>

One context where the law currently diverges from Sunstein and Thaler's rejection of randomization as a default rule—and where the law seems to have the better of the normative argument—involves the exercise of *political* agency. Consider the placement of names on a voting ballot. Order effects are at least as powerful in a ballot context as they are in Sunstein and Thaler's cafeteria line example: voters are more likely to choose the candidate listed first on the ballot.<sup>60</sup> Yet the consensus response

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<sup>56</sup> See Sunstein & Thaler, *supra* note 1, at 1164.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* ("Option 1 appears to be paternalistic, but would anyone advocate options 2 or 3?").

<sup>59</sup> See *id.*

<sup>60</sup> See Laura Miller, *Election by Lottery: Ballot Order, Equal Protection, and the Irrational Voter*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 373, 388 (2010) ("In sum, ballot order matters. The effect is likely

to the power of order effects in the voting context is *not* to empower the administrator in charge of ballot design to choose a default rule that favors the candidate he sincerely believes would promote welfare.<sup>61</sup> Voting administrators generally eschew the opportunity to harness order effects in service of libertarian paternalist goals in favor of randomizing or alternating the order of candidate names on the ballots—the very option that Sunstein and Thaler wrote off as absurd in the cafeteria case.<sup>62</sup> Randomizing the order of names, rather than allowing an administrator to exercise his paternalistic judgment, would seem the correct option even if order effects were *extremely* strong—so strong that most voters just voted for the first candidate on the ballot. (Sunstein seems to agree with this conclusion,<sup>63</sup> though he does not explain in depth how it can be made to fit with his broader view.)

What explains our judgment that ballots should be random? I would answer that randomization can achieve one important goal: that voters' decisions not be systematically guided by administrators toward or away from a specific candidate. Even if order effects were so strong that most voters ended up choosing the first candidate on the ballot, those order effects are not *systematically* tilted toward one candidate or another, and, in particular, not toward a candidate favored by the administrator. While randomization or alternation are exercises of human agency,<sup>64</sup> they are exercises of human agency that demur from employing the power of order effects to favor one side or the other.<sup>65</sup> Although the voter using a random ballot is not free from state *interference*—the state has stepped in to prevent order effects from systematically advantaging any particular

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relatively small for major party candidates in general elections, but the effect is substantial for minor party candidates in the same races.”).

<sup>61</sup> See, e.g., *Sangmeister v. Woodard*, 565 F.2d 460, 468 (7th Cir. 1977) (“The procedure adopted must be neutral in character. This court will not accept a procedure that invariably awards the first position on the ballot to the County Clerk’s party, the incumbent’s party, or the ‘majority’ party.”) (citation omitted).

<sup>62</sup> See Miller, *supra* note 60, at 391-93 (collecting cases and statutes); see generally Mary Beth Beazley, *Ballot Design as Fail-Safe: An Ounce of Rotation Is Worth a Pound of Litigation*, 12 ELECTION L.J. 18 (2013) (arguing in favor of randomizing ballot order).

<sup>63</sup> See *Behavioral Economics*, *supra* note 39, at 1897 (“We would not, for example, want to authorize government to default people into voting for incumbents by saying that unless they explicitly indicate otherwise, or actually show up at the ballot booth, they are presumed to vote for incumbents.”).

<sup>64</sup> See Sunstein & Thaler, *supra* note 1, at 1164 (“In many situations, some organization or agent must make a choice that will affect the behavior of some other people.”).

<sup>65</sup> Cf. Carol Nicole Brown, *Casting Lots: The Illusion of Justice and Accountability in Property Allocation*, 53 BUFF. L. REV. 65, 90 n.84 (2005) (“[T]he lottery exonerates decision-makers by freeing individuals and government from the burden of making difficult decisions, thereby placing blame and responsibility at the feet of chance.”); Eunice Belgum, *Medical Experimentation: Personal Integrity and Social Policy*, 89 HARV. L. REV. 822, 828 (1976) (book review) (“When allocation to one or the other therapy is made on the basis of a randomizing device, the doctor relinquishes the power to make the patient’s ends take precedence.”).

candidate—she is free from state *domination*, since the state does not enjoy a power to steer her vote toward any particular candidate.<sup>66</sup>

Voting and reproductive decisionmaking, I believe, share important similarities that make libertarian paternalism inappropriate. Although we could imagine a different society in which reproductive choices were not political decisions, abortion decisions—as well as other reproductive decisions—are among the most politicized choices in 21st-century America.<sup>67</sup> (Indeed, the Supreme Court's decision in *Casey* to not overrule *Roe v. Wade* reflected a recognition of how politicized the abortion decision had become.)<sup>68</sup> Courts hearing asylum cases have recognized that the imposition of coercive policies restricting the choice to become and remain pregnant constitutes political oppression.<sup>69</sup> Those who politicize reproductive decisionmaking must take the bitter with the sweet: they cannot bring women's reproductive decisions into the public arena and then refuse to provide those decisions the protection afforded other forms of political decisionmaking.

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<sup>66</sup> See *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 916 (Stevens, J., concurring in part and dissenting in part) (“Decisional autonomy must limit the State’s power to inject into a woman’s most personal deliberations its own views of what is best.”); cf. Gerald J. Russello, *Liberal Ends and Republican Means*, 28 SETON HALL L. REV. 740, 743 (1997) (book review) (discussing the political philosopher Philip Pettit’s “idea of freedom as ‘non-domination’; that is, freedom consists in the absence of mastery by others”).

<sup>67</sup> See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 559 (1989) (Blackmun, J., concurring in part and dissenting in part) (“Today’s decision involves the most politically divisive domestic legal issue of our time.”); *Operation Save Am. v. City of Jackson*, 275 P.3d 438, 449 (Wyo. 2012) (“Among the issues in the United States today that are divisive and inflammatory, none is so hotly debated as that of abortion. On the national stage, the issue is front and center in the halls of Congress, on the political campaign trail, and in many state legislatures.”); *Alpha Med. Clinic v. Anderson*, 128 P.3d 364, 375 (Kan. 2006) (“The issue of abortion has long had a polarizing effect on national and state politics and policies. Although some may lament this fact, they cannot deny it.”); see also Miranda R. Waggoner, *Motherhood Preconceived: The Emergence of the Preconception Health and Health Care Initiative*, 38 J. HEALTH POL. POL’Y & L. 345, 364 (2013) (“Women’s health and reproductive health have become profoundly politicized in the past few decades.”); B. Jessie Hill, *What Is the Meaning of Health? Constitutional Implications of Defining “Medical Necessity” and “Essential Health Benefits” Under the Affordable Care Act*, 38 AM. J.L. & MED. 445, 459 (2012) (noting that “[p]erhaps the most obviously politicized area of healthcare . . . is reproductive healthcare” and reviewing political debates over access to contraception and abortion).

<sup>68</sup> *Casey*, 505 U.S. at 866-67 (“Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”).

<sup>69</sup> E.g., 8 U.S.C. § 1101(a)(42)(B) (2012) (“For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion”); *Zheng v. Holder*, 722 F.3d 986, 989 (7th Cir. 2013) (“Forced abortion or sterilization, or persecution for resistance to coercive population control policies, constitutes persecution on the basis of political opinion.”).

The treatment of protests outside abortion clinics presents further evidence of the parallel between abortion decisions and political decisionmaking.<sup>70</sup> These laws bear a close similarity to laws prohibiting electioneering within a fixed distance of the polls.<sup>71</sup> Courts' willingness to uphold buffer zones outside both abortion clinics and polling places can be understood as recognitions that political decisionmaking must be insulated from external pressure.<sup>72</sup> Such insulation is all the more important to the extent that pressure is being directed at defined social groups, such as women in the abortion case or racial minorities in the voting case.<sup>73</sup> To the

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<sup>70</sup> E.g., *Hill v. Colorado*, 530 U.S. 703, 728 (2000) (noting the "special governmental interests surrounding . . . polling places" as part of the argument in support of buffer zones around abortion clinics).

<sup>71</sup> E.g., *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (holding that "requiring solicitors to stand 100 feet from the entrance to polling places does not constitute an unconstitutional compromise"); cf. Wilson Huhn, *Scienter, Causation, and Harm in Freedom of Expression Analysis: The Right Hand Side of the Constitutional Calculus*, 13 WM. & MARY BILL RTS. J. 125, 150 (2004) (juxtaposing discussion of "a law that prohibits electioneering within fifty feet of a polling place on election day" and a law providing for "an eight foot 'bubble' around patients visiting abortion clinics to prevent harassment by protestors"); Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 500-01 (2009) ("Restrictions can even be placed on electioneering within one hundred feet of polling places on election day to prevent voter intimidation. . . . Neither is harassing anti-abortion speech shielded by the First Amendment even though it may be politically motivated.").

<sup>72</sup> See Kenneth Agran, *When Government Must Pay: Compensating Rights and the Constitution*, 22 CONST. COMMENT. 97, 132, 134 (2005) (arguing that "the kinds of state regulations of abortion sustained in *Casey* would be regarded as coercive and patently unconstitutional if applied to the right to vote" and that "[t]he effect of decisions like *Maher*, *McRae*, and *Casey* is to deny to poor pregnant women the same kind of private and secure environment—free from coercion and undue influence—in which to make a thoughtful and intelligent decision of extraordinary importance."); see also Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to A Protected Choice*, 56 UCLA L. REV. 351, 389 (2008) ("To secure voters' ability to think through how to cast their ballots, the state also protects the physical space around the voting booth from electioneering. This protected space—one hundred feet in Los Angeles, one hundred yards in Wyoming—suggests that there are occasions when the state recognizes a person's right not to be appealed to by partisans in a campaign. . . . You may of course continue to reflect on partisan arguments and change your mind anytime before you pull the lever. But the premise of the protected space is that at some point in the process of voting, you should not be intruded upon by any further manner of entreaty or appeal. The issue is a matter of timing as well as one of space. There must be some period, however brief, between having made a decision and acting upon it into which the state cannot intrude—something like a decisional no-fly zone.").

<sup>73</sup> Cf. *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417, 1439 (W.D.N.Y. 1992), *aff'd in part, rev'd in part sub nom. Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997) ("During the civil rights movement, segregationists congregated in front of schools and polling places with attack dogs and clubs in order to intimidate blacks into foregoing their constitutional rights to an integrated education and to vote. Here, defendants are attempting to prevent women from exercising their constitutional right to choose to have an abortion. However, instead of using dogs and clubs, defendants use cameras and the threat of exposure to scare and intimidate vulnerable women into foregoing their constitutional rights. While the immediacy and severity of the threat posed by the cameras is obviously less, the camera, like the attack dog, is just a tool used by defendants to intimidate women from exercising their constitutional rights and may be restricted without violating defendants' rights."); Bruce Brown, *Injunctive Relief and Section 1985(3): Anti-Abortion Blockaders Meet the "Ku Klux Klan Act"*, 39 BUFF. L. REV. 855, 875 (1991) ("The agreement among the anti-abortion blockaders is to act in a manner that will result in the



extent that libertarian-paternalist nudges at the polling place violate electioneering prohibitions,<sup>74</sup> the same may be true for nudges in the abortion context. Where political agency is at issue—as it is at the abortion clinic and the voting booth, but not in the cafeteria line—the administrator must abandon his nudging efforts.

### *B. Pregnancy and the Accommodation of Intimate Choices*

The New York City campaign differs from the anti-abortion nudges discussed above in several ways. It is directed at teens, while anti-abortion nudges are directed at adults; it claims to be grounded in social science rather than in religious or other values; and—most importantly—it does not mandate that teens experience these nudges before becoming pregnant. Nonetheless, in this Part, I will offer a criticism of New York City's efforts: although not as objectionable as anti-abortion nudges, they may be objectionable nonetheless. After noting problems with the *empirical* justification for New York City's efforts, I will make the *normative* argument that, rather than discouraging choices to become or remain pregnant, society has some responsibility to accommodate those choices because of their intimate nature.

First, the empirical concerns. Social-scientific data that show that children of teenage parents have worse life outcomes may reflect the effects of poverty or of discrimination against teenage parents and their children, rather than any intrinsic inability of teenage parents to effectively raise children. The Supreme Court recognized the importance of investigating the cause of disadvantage in *Palmore v. Sidoti*, when it found that bias against a mother in an interracial relationship—even though it might disadvantage her children—could not justify removing her custody, because the law should not give effect to private biases.<sup>75</sup> Several critics of the New York City advertisements pointed out that they treated teen pregnancy as a direct cause of disadvantage, rather than recognizing that a variety of social forces work to disadvantage the children of teenage

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denial of abortion to all women. . . . An analogous situation would be if African-Americans were subjected to blockading activities when they tried to enter a polling place.”).

<sup>74</sup> See, e.g., Jeremy A. Blumenthal & Terry L. Turnipseed, *The Polling Place Priming (PPP) Effect: Is Voting in Churches (Or Anywhere Else) Unconstitutional?*, 91 B.U. L. REV. 561 (2011) (raising concerns about the psychological priming effects of different types of polling places on voters); Chad Flanders, *How do you spell M-u-r-k-o-w-s-k-i? Part I: The Question of Assistance to the Voter*, 28 ALASKA L. REV. 1, 10-11 (2011) (discussing the Alaska Superior Court's concerns in a recent case that providing the names of write-in candidates to voters would subtly encourage them to vote for those candidates); James A. Gardner, *Neutralizing the Incompetent Voter: A Comment on Cook v. Gralike*, 1 ELECTION L.J. 49, 55 (2002) (discussing the “many ways in which irrational or uninformed voters may be manipulated by subtle yet unscrupulous election practices at the polling place”).

<sup>75</sup> *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984) (reversing a state court decision that, on the basis that interracial marriage was the object of public stigma, denied custody to interracial couples).

parents.<sup>76</sup> Relatedly, efforts to nudge teens away from pregnancy in order to save public money may ignore other, superior ways in which public money could be saved. Melissa Harris-Perry objects that New York City's campaign could lead "some people to . . . blame young mothers for America's deepening poverty crisis rather than putting the blame where it belongs, on a financial system that concentrates wealth at the top and public policies that entrench it there[.]"<sup>77</sup>

These objections gain additional force when we consider that the advertisements misrepresent underlying empirical facts in a way that overemphasizes the disadvantages produced by teen parenthood. The advertisements claim that "90% of teen parents don't marry each other" when the underlying evidence states only "that less than 8% of teen mothers marry their baby's father *within a year* of the birth," and claim that finishing high school, getting "a job," and getting married before having a child ensures a 98% chance of avoiding poverty despite the underlying evidence referring to a *full time* job.<sup>78</sup> Given the decline in full-time employment—a decline arguably attributable in part to deregulation advocated by wealthy elites—the latter statistic seems particularly misleading.<sup>79</sup>

In addition to these empirical concerns, the intimate nature of the choice at issue indicates that society would do better to consider accommodating individual reproductive choices rather than relentlessly emphasizing the ways in which these choices benefit and burden third

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<sup>76</sup> See, e.g., Press Release, Planned Parenthood, New NYC Teen Pregnancy Subway Advertising Campaign Not the Answer (Mar. 6, 2013), available at <http://www.plannedparenthood.org/nyc/3-6-13-41037.htm> ("[T]here is a false premise in believing that teen pregnancy is the cause of poverty when in fact many researchers have found that teen childbearing is an outcome rather than a cause of the poor economic conditions faced by many teens in this city."); Miriam Pérez, *NYC Teen Pregnancy Campaign Brings Shaming to Bus Shelters and Cell Phones*, RH REALITY CHECK (Mar. 5, 2013, 12:06 PM), <http://rhrefrealitycheck.org/article/2013/03/05/nyc-teen-pregnancy-campaign-brings-shaming-to-bus-shelters-and-cell-phones/> ("These ads put all of the responsibility on teens themselves and present avoiding pregnancy as a panacea that will solve all their problems. Meanwhile, the unemployment rate for youth today is staggering, even if they finish high school. Teen pregnancy is much more than a personal responsibility problem, but the campaign might as well be telling teens to pull themselves up by their bootstraps.").

<sup>77</sup> Melissa Jeltsen, *Teen Pregnancy Campaign Ripped By Melissa Harris-Perry*, HUFFINGTON POST (Mar. 9, 2013, 3:21 PM), [http://www.huffingtonpost.com/2013/03/09/teen-pregnancy-campaign\\_n\\_2845144.html](http://www.huffingtonpost.com/2013/03/09/teen-pregnancy-campaign_n_2845144.html).

<sup>78</sup> N.Y.C HUMAN RES. ADMIN., OFFICE OF COMM'C'N & MKTG., TEEN PREGNANCY CAMPAIGN OER NOTES, available at [http://www.nyc.gov/html/hra/downloads/pdf/news/campaigns/teen\\_pregnancy/citation\\_notes.pdf](http://www.nyc.gov/html/hra/downloads/pdf/news/campaigns/teen_pregnancy/citation_notes.pdf).

<sup>79</sup> See Deborah Groban Olson, *Fair Exchange: Providing Citizens with Equity Managed by a Community Trust, in Return for Government Subsidies or Tax Breaks to Businesses*, 15 CORNELL J.L. & PUB. POL'Y 231, 362-63 (2006) ("In recent years the quality of life in the U.S. has decreased due to global competition, with economic growth feeding corporate profits and lost U.S. manufacturing jobs not being replaced with similarly high-paid, full-time jobs with benefits."); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 417 (2004) (noting a "decrease in the percentage of workers employed in stable full-time jobs . . .").

parties. Seana Shiffrin has developed a detailed argument for accommodating intimate choices more generally:

[S]ubsidizing others' activities, in some domains, may be necessary to retain spheres of activity in which agents can act autonomously and reap the goods associated both with acting freely and with the feeling that one acts freely. Where the environment is permeated by cost-exaction and public-spirited reminders that even many seemingly self-regarding acts have other-regarding effects, agents may feel constrained by the sense that everything they do has an impact on others and is subject to accounting. Even if this accounting is fair, the ubiquity of the message may nonetheless constrain or chill choice. The responsive citizen may not get over the sense that his actions impose costs on others or that they disapprove. Some of the goods of less-encumbered free choice may thus be sacrificed. Some of the more important goods of self-expression may be lost, particularly in arenas in which agents are especially susceptible to social pressure. It may be important to preserve some social domains in which one's choices are not so closely monitored so that agents feel psychologically, as well as morally, free to choose as they see fit.<sup>80</sup>

Importantly, Shiffrin's argument provides reason to reject not only traditional paternalism but also libertarian-paternalist efforts at nudging through exhortations and incentives. The sorts of advertisements employed in the New York City campaign—which relentlessly stress the costs that teenage pregnancy imposes on children and on one's future<sup>81</sup>—seem to create exactly the sort of environment of “cost-exaction and public-spirited reminders that even many seemingly self-regarding acts have other-regarding effects”<sup>82</sup> that Shiffrin criticizes.

In contrast, an environment in which we accommodate choices allows choosers to focus on how the choice in question will affect their own identity and relationship with others, rather than on the effects of that choice on broader matters of public policy.<sup>83</sup> For instance, religious accommodation in the workplace permits people to decide which religion (if any) to practice on the basis of the appeal of the faith itself, rather than whether it allows for convenient holidays.<sup>84</sup> The ability to make decisions

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<sup>80</sup> Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 239-40 (2000).

<sup>81</sup> See *Freedom to Make the Right Choice*, *supra* note 48 (“While the ‘real costs’ worrying the City would seem to be the impact of teen pregnancy on the public purse, that impact is unmentioned. Rather, the costs identified in the ads are those said to be paid by the parents or the child. In one of the ads, for instance, a baby in a shirt with ‘Mommy’s’ written on the front, says in a childish script, ‘Dad, you’ll be paying to support me for the next 20 years.’ In another ad, the baby asks, ‘Got a good job? I cost thousands of dollars each year.’ Across the child in both ads runs the line, ‘Think being a teen parent won’t cost you?’”).

<sup>82</sup> Shiffrin, *supra* note 80, at 239.

<sup>83</sup> *Id.* at 247 (“Accommodation restricts the sorts of reasons the agent and those who interact with her must consider. To varying degrees, creating insulated areas allows an agent to focus on some of the distinctive reasons associated with the activity. It protects her from worrying about certain goods and reasons only contingently or indirectly associated with the activity.”).

<sup>84</sup> *Id.*

in light of one's own values rather than economic considerations is, for Shiffrin, a value worth promoting:

This sort of focus is valuable partly because it helps to facilitate the agent's integrity—some sorts of decisions are highly delicate and agents are prone to distraction and temptation. But more than that, it promotes a certain sort of freedom. It allows an agent to respond to a certain range of reasons that might otherwise be dominated by considerations relating to others, by morality, or by physical and financial need; in so doing, it permits her the chance to exercise a particular aspect of her capacity for choice. . . . The potential adherent may exercise her capacities for evaluating her religious beliefs and commitments; these are not, in all environments, mixed in with her choices about physical and material needs. . . . Even a very limited and constricted opportunity to respond to certain sorts of important reasons and to exercise certain capacities for choice in ways that are not fully dominated by other considerations seems like a part of autonomy's value that is worth protecting.<sup>85</sup>

Shiffrin then considers some factors that favor accommodation of particular choices, including whether:

- 1) "the decisions being supported are highly personal and critical to one's sense of self";
- 2) "the decisions are highly personal ones involving the body";
- 3) "the denial of accommodation will engender significant harm or loss of agency";
- 4) "the denial of accommodation will make the agent's projects infeasible"; and/or
- 5) "the decisions being supported are ones that are difficult to make and involve hard cases, difficult judgments, or areas in which agents are highly vulnerable or susceptible to overvaluing the opinions or effects on others."<sup>86</sup>

Reproductive decisionmaking involves many of these factors: it requires choices that are highly personal and connected to the sense of self and to bodily autonomy, and often involves difficult and complicated choices. As Yashar Saghai argues,

some health-affecting choices are so fundamental for leading a self-determining life that they ought to be as fully noncontrolled by others as possible. They ought to benefit from a strong presumption in their favour. The substantial noncontrol that nudges guarantee may sometimes not be sufficiently protective of those liberties (eg, [sic] certain end-of-life and reproductive choices).<sup>87</sup>

Meanwhile, few or none of the factors Shiffrin discusses as counting *against* accommodation apply to reproductive decisionmaking: the accommodation in question primarily involves financial support, and does not require others in society to affirmatively embrace or endorse women's

<sup>85</sup> *Id.* at 247–48.

<sup>86</sup> *Id.* at 248.

<sup>87</sup> Yashar Saghai, *Salvaging the Concept of Nudge*, 39 J. MED. ETHICS 1, 1 (2013).

decisions to become pregnant, but simply to avoid practices that stigmatize these decisions.<sup>88</sup>

### *C. Options, Menus, and Changed Choices*

Finally, return to Sunstein and Thaler's claim that libertarian paternalism does not impose significant costs on those who depart from the planner's preferred option.<sup>89</sup> I would argue that libertarian paternalism does not simply *prefer* one option over others, but instead *changes* the set of options available to women, adding some options and deleting others. Reproductive choices—like many other choices—depend on context.

Amartya Sen persuasively argues for the relevance of context to choice. For instance, etiquette can make it normatively appropriate to take a medium-sized piece of cake when a large piece is present, but a small piece when only it and the medium-sized piece are present.<sup>90</sup> Even though the large piece remains unchosen, it appropriately affects the choice between alternatives. Sen also observes that an unchosen option can cast other options in a different light: a law-abiding citizen may happily attend a new friend's tea party rather than stay home, but stay home if the friend offers a choice between a tea party and a cocaine party.<sup>91</sup> An unchosen option can affect other options' expressive meaning: fasting and starving both involve not eating, but fasting requires the availability of other (unchosen) options.<sup>92</sup> These choices, Sen argues, reflect genuine normative differences.<sup>93</sup>

In the case of reproductive choice, requiring the physician to offer the additional "option" of viewing an ultrasound or hearing the fetus's heartbeat may put the woman in a parallel position to the enthusiastic tea lover offered the option of a cocaine party. Just as the tea lover may become rightly suspicious about the character of his cocaine-proffering companion, a patient seeking abortion may become suspicious and distrustful of a physician who forces unwanted information on her or subjects her to an undesired procedure such as transvaginal ultrasound.

Meanwhile, a teenager contemplating contraception or abortion may find the social meaning of her decision changed by the incentives those like Christakis, Sunstein, and Thaler would offer her. The option of receiving

<sup>88</sup> Shiffrin, *supra* note 80, at 248.

<sup>89</sup> See discussion *supra* Introduction, Part I, and accompanying notes.

<sup>90</sup> Amartya Sen, *Internal Consistency of Choice*, 61 *ECONOMETRICA* 495, 501 (1993) [hereinafter *Internal Consistency*]; see also Govind C. Persad, Note, *Risk, Everyday Intuitions, and the Institutional Value of Tort Law*, 62 *STAN. L. REV.* 1445, 1449 (2010) (discussing similar examples).

<sup>91</sup> *Internal Consistency*, *supra* note 90, at 502.

<sup>92</sup> *Id.*

<sup>93</sup> Amartya Sen, *Maximization and the Act of Choice*, 65 *ECONOMETRICA* 745, 752 n.20 (1997) ("The influence of 'framing' arises when essentially the *same* decision is presented in different ways, whereas what we are considering here is a *real* variation of the decision problem, when a change of the menu from which a choice is to be made makes a material difference. There is, in fact, no inconsistency here, only menu dependence of preference rankings[.]") (citation omitted).

money could convert her decision from an expression of her values and goals into a purely financial transaction: while it may seem appealing to take the morning-after pill in order to pursue childbearing on one's own terms, it may seem repugnant to take it in order to receive \$50—and the offer of money may convert the former choice into the latter.<sup>94</sup> Ultimately, if libertarian paternalism is to be justifiable, it must be justified in spite of its alteration of individuals' option sets, not on the basis that it does not substantially affect their options.

### CONCLUSION

I hope to have provoked doubt, or at least debate, about the appropriateness of nudging reproductive choices. In this concluding section, I will briefly explore the implications of my argument for nudges more generally.

In recent work, Sunstein has adopted the view that government may only employ libertarian paternalism in service of appropriate ends:

Suppose, for example, that government were to engage in soft paternalism—say, through an educational campaign—designed to discourage people from having sex before marriage or from choosing abortion. Some people might think that efforts of this kind would be illicit, because they would violate a commitment to neutrality in the relevant domains. Perhaps those people are right; perhaps not. In either case, the central question would be whether the government's ends were illicit; it is not about paternalism.<sup>95</sup>

Sunstein's argument here would support paternalism (of all kinds) in pursuit of legitimate state purposes, and would rule out paternalism (of any kind) in pursuit of illicit purposes. But the original promise of libertarian paternalism was not that it burdened choice in pursuit of legitimate ends, but that we could simply skip past the question of legitimacy and go straight to cost-benefit analysis, because libertarian paternalist nudges do not burden choices in a way that requires compelling justification.<sup>96</sup> Nudging seems much less revolutionary when we understand it merely as a low-burden way of implementing *ends already accepted as licit*, rather than a way of avoiding hard debates about *which ends are licit*. Although Sunstein offers persuasive evidence that administrative choice-steering is

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<sup>94</sup> See, e.g., Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1 (2000) (finding that a financial penalty did not deter conduct, and speculating that this involves the "crowding out" of prosocial motivations by financial ones); Uri Gneezy, Stephan Meier & Pedro Rey-Biel, *When and Why Incentives (Don't) Work to Modify Behavior*, 25 J. ECON. PERSP. 1, 2-4 (2011) (reviewing cases where incentives crowd out prosocial motivations); see generally RUTH W. GRANT, STRINGS ATTACHED: UNTANGLING THE ETHICS OF INCENTIVES, 76-122 (2012) (discussing ethical and empirical problems with payment incentives).

<sup>95</sup> *Behavioral Economics*, *supra* note 39, at 1898.

<sup>96</sup> Cf. Anuj C. Desai, *Libertarian Paternalism, Externalities, and the "Spirit of Liberty": How Thaler and Sunstein Are Nudging Us Toward an "Overlapping Consensus"*, 36 LAW & SOC. INQUIRY 263, 275 (2011) ("Thaler and Sunstein almost imply that they have created policies without any losers, policies that are ranked more highly by what is known as the Pareto principle.").

unavoidable, he does nothing to motivate his further claim that choices should be steered in the way that cost-benefit analysis directs.<sup>97</sup> Such a claim would require showing that the ends of cost-benefit analysis are licit ones for government to pursue—a difficult showing to make.<sup>98</sup>

Furthermore, Sunstein's ultimate conclusion seems to reduce the discussion of nudges narrowly to a discussion about the *aims* of nudges. But the examples discussed above indicate both that libertarian paternalist nudges can burden choice in a way that requires justification (as Sunstein now seems to concede), and that different policy interventions with the same aim may vary in appropriateness due to differences with respect to other factors: their *focus* and their *effect*. I discuss these latter two factors now.

First, we should be hesitant about directing policy interventions, including nudges, narrowly at specific groups. Many nudges in the context of reproductive choice, such as Emens's disability education proposal, pose a potential threat to equal social standing. If administrators promote positive attitudes toward disability broadly—for instance, by inviting a person with a disability to serve in a prominent public office—then no individual or group is singled out for special scrutiny or branded as potentially misinformed. In contrast, singling out only *parents who choose testing* for disability-related educational efforts, as Emens proposes,<sup>99</sup> subjects this group—one likely facing a variety of other costs and challenges—both to a time-consuming intervention and to a potentially demeaning message: “We are especially worried that *you* are going to make mistakes in thinking about disability, and so we are going to focus our educational efforts on you, rather than educating everyone.”

Narrow focus also makes broad public debate about nudges less likely. If administrators propose to nudge everyone—for instance, if they propose to explain their views on the moral status of fetuses to everyone—the

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<sup>97</sup> Sunstein & Thaler, *supra* note 1, at 1190 (asking “[h]ow should sensible planners choose among possible systems, given that some choice is necessary?” and suggesting the answer that “a comparison of possible rules should be done using a form of cost-benefit analysis”).

<sup>98</sup> Cf. Susan Rose-Ackerman, *Precaution, Proportionality, and Cost/Benefit Analysis: False Analogies*, 4 EUR. J. RISK REG. 281, 285 (2013) (“[C]ost/benefit analysis cannot objectively resolve difficult issues behind the use of the proportionality and precautionary principles and cannot mediate conflicts between them. First of all, it is based on a normative commitment to applied utilitarianism, and second, even given that normative perspective, it requires one to make judgments that cannot be based solely on technical economic reasoning.”); Alexander Volokh, *The Fifteenth Annual Frankel Lecture: Commentary: Rationality or Rationalism? The Positive and Normative Flaws of Cost-Benefit Analysis*, 48 Hous. L. Rev. 79, 82 (2011) (reporting that “[w]hen I teach environmental law and economics, my students usually come in . . . skeptical of cost-benefit analysis” and considering a variety of problems with the approach); Douglas A. Kysar, *The Fifteenth Annual Frankel Lecture: Commentary: Politics by Other Meanings: A Comment on “Retaking Rationality Two Years Later”*, 48 Hous. L. Rev. 43, 76-77 (2011) (“Cost-benefit analysis is a language spoken by few and dominated by even fewer. Its diction is poor though it purports to speak everything meaningful.”).

<sup>99</sup> See *Framing Disability*, *supra* note 38, at 1395.

details of that education will become a matter of public debate.<sup>100</sup> In contrast, if administrators nudge only a small minority of people, most of society may never learn about the nudging effort. Sunstein notes the issue of whether nudges prompt sufficient public debate,<sup>101</sup> but does not discuss the question of whether narrow policies are preferable to broad ones. Ultimately broader policies have substantial advantages on equality grounds, as discussions of HIV testing,<sup>102</sup> searches,<sup>103</sup> and elder abuse prevention<sup>104</sup> note. (To Emens's credit, she notes—though ultimately rejects—the possibility of slightly broader efforts.)<sup>105</sup>

Second, we should be attentive to the actual effects of nudges. Taunya Banks notes that health care professionals regard directive counseling as a “less coercive means of discouraging [HIV-positive] women from bearing children,” but nonetheless criticizes this counseling as an abuse of power.<sup>106</sup> She notes and rebuts the argument that, because directive counseling does not fence off the choice to pursue pregnancy, it is easier to justify than a direct prohibition:

Some may contend that directive counseling is appropriate and does not violate the ADA since it will dissuade some HIV-positive women from bearing

<sup>100</sup> Cf. Daphne Barak-Erez, *Distributive Justice in National Security Law*, 3 HARV. NAT'L SEC. J. 283, 304 (2012) (“[A]dvocating the use of anti-terrorism measures that target the public more generally appears advisable because such measures will be debated much more seriously.”).

<sup>101</sup> *Behavioral Economics*, *supra* note 39, at 1890–93.

<sup>102</sup> Lawrence O. Gostin, *HIV Screening in Health Care Settings: Public Health and Civil Liberties in Conflict?*, 296 JAMA 2023, 2024 (2006) (contending that universal testing for HIV is “less stigmatizing because it does not single out vulnerable population and applies equally to all socio-economic classes and racial groups”); Erin Nicholson, Note, *Mandatory HIV Testing of Pregnant Women: Public Health Policy Considerations and Alternatives*, 9 DUKE J. GENDER L. & POL'Y 175, 183 (2002) (“It is possible that a program that tests uniformly would at least end the singling-out of certain races and classes . . .”).

<sup>103</sup> Barak-Erez, *supra* note 100, at 300–07; *see also* *People v. Hyde*, 524 P.2d 830, 843 (Cal. 1974) (“[A] third feature of public facility screening searches which operates to soften the impact of their intrusion upon individual privacy is the fact that all citizens who wish to use the particular facility involved are subject to the same screening procedures. No one is singled out for different treatment from his fellow travelers. There is no social stigma associated with airport screening inspections and the individuals who must submit to these searches do not run the risk of public ridicule or suspicion.”); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 809 (1994) (“A broader search is sometimes better, fairer, more regular, more constitutionally reasonable, if it reduces the opportunities for official arbitrariness, discretion, and discrimination. If we focus only on probabilities and probable cause, we will get it backwards. The broader, more evenhanded search is sometimes more constitutionally reasonable even if the probabilities are lower for each citizen searched.”); Kari L. Higbee, Comment, *Student Privacy Rights: Drug Testing and Fourth Amendment Protections*, 41 IDAHO L. REV. 361, 401 n.166 (2005) (“[S]tigmatizing more readily occurs in individualized suspicion situations when a single or narrow group of students are targeted as opposed to a mass of students all subjected to the same requirements under suspicionless testing.”).

<sup>104</sup> Betsy Abramson et al., *Isolation as a Domestic Violence Tactic in Later Life Cases: What Attorneys Need to Know*, 3 NAELA J. 47, 63 (2007) (“Informing clients that the attorney engages in universal screening removes a stigma or concern by clients that their status as a victim of domestic violence is somehow ‘showing.’”).

<sup>105</sup> *See Framing Disability*, *supra* note 38, at 1418.

<sup>106</sup> Banks, *supra* note 52, at 79.



children but will not pose an impenetrable barrier to childbearing. While it is true that counseling cannot be equated with a direct prohibition, many women, irrespective of their race or education, do not seriously question health-related advice from medical providers, and this is particularly true of low-income women. Therefore, so-called clinical advice can have a powerful and perhaps coercive effect on some women's reproductive decision making.<sup>107</sup>

Banks's point is an important one. Sunstein asserts that "insofar as it maintains freedom of choice, soft paternalism is less intrusive and less dangerous than mandates and bans."<sup>108</sup> Yet some nudges may have a stronger *de facto* effect than some mandates or bans. For instance, laws that raise the cost of abortion may substantially affect the number of women carrying unwanted pregnancies to term, and may have a much more substantial effect than—for instance—a complete ban on late-term abortions.<sup>109</sup> This is so even though women subject to cost-increasing laws retain formal freedom of choice; formal freedom does not preclude substantive unfreedom.<sup>110</sup> As such, some libertarian paternalist nudges, though they may satisfy libertarians, will be unsatisfactory to those who value positive economic freedom.

Third, Sunstein's focus on the *ends* of nudges rather than the *effects* of nudges poses problems for nudges that are enacted to serve multiple purposes. Consider financial nudges that differentiate the situation of pregnant and nonpregnant women. A law that financially subsidizes pregnancy and birth might have the laudable purpose of improving child welfare or of freeing women to pursue both parenthood and career. However, such a law might also have the controversial purpose of increasing birthrate among the native-born<sup>111</sup> or encouraging women to

<sup>107</sup> *Id.* at 89.

<sup>108</sup> *Behavioral Economics*, *supra* note 39, at 1894.

<sup>109</sup> Compare *A Woman's Choice—East Side Women's Clinic v. Newman*, 305 F.3d 684, 712-15 (7th Cir. 2002) (Wood, J., dissenting) (reviewing factual findings that informed consent requirements substantially affect the number of abortions by raising the cost of abortion), and Marshall H. Mcdoft, *Unintended Pregnancies, Restrictive Abortion Laws, and Abortion Demand*, ISRN ECON. 1, 5 (2012) (reporting that restrictions on Medicaid funding of abortions substantially decrease the proportion of unintended pregnancies that are terminated by abortion), with Kurt D. Ebersbach, *Women's Medical Professional Corp. v. Voinovich: Applying Overbreadth Analysis to Post-Viability Abortion Regulations*, 30 GA. L. REV. 1151, 1179 (1996) ("The available statistics show . . . that late-term abortions are exceedingly rare.").

<sup>110</sup> Cf. Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893, 923 (2010) ("The assumption that the formal recognition that women have a right to control their names means that women act entirely freely with regard to their names is misguided."); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1164 (1993) (noting that "a regime of formal freedom and equal rights may in fact be unfree and unequal because of gross preexisting inequality in economic or other power").

<sup>111</sup> Paul A. Lombardo, *"The American Breed": Nazi Eugenics and the Origins of the Pioneer Fund*, 65 ALB. L. REV. 743, 787 (2002) (discussing investigations of whether "providing financial aid to support additional children would actually increase the birthrate among junior flying officers"); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 244 (2006) (criticizing a "racist ideology unashamedly articulated by Maggie Gallagher in papers she has

pursue their religiously prescribed destiny of marrying and bearing children.<sup>112</sup> Sunstein's most recent proposal leaves it unclear how we should evaluate nudges that reflect compromises between different purposes—as we see when we consider the fact that nudges to inform women about disability resources have been endorsed both by disability advocates and by religiously motivated foes of abortion like Senator Sam Brownback.<sup>113</sup>

None of these objections show that we may never nudge, nor that we may uncritically retain existing default rules. Rather, they go to show that any default rule must be subject to public discussion and must be scrutinized by law. I end with a suggestion about how efforts to nudge reproductive choices might be made more justifiable: soliciting the input of the women whom these efforts target. As an example, older New York City programs addressing teenage pregnancy—unlike the recent advertising campaign I criticize above—presented the perspectives of actual teenage parents.<sup>114</sup> There is nothing objectionable about employing nudges that help individuals access reproductive health services where the individuals have expressed interest in accessing those services.<sup>115</sup> In contrast, New York's presenting the perspective of the mayor in the guise of an imagined baby,<sup>116</sup> rather than the voices of actual teenage parents, constitutes the sort

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submitted in the same-sex marriage cases" that "runs like this: low fertility rates among Europeans and people of European descent threaten the continued viability of these cultures. Society needs an institution that will encourage white people to have children. Marriage is that institution. Low fertility rates are linked to the movement away from marriage. Thus, if white people in developed countries are not to become extinct, they must marry and have children.").

<sup>112</sup> E.g., Luke Gormally, *The Crisis over the Institution of Marriage and Contemporary Bioethics*, 4 AVE MARIA L. REV. 547, 555 (2006) ("The complex human good of marriage . . . can be identified as the end of that fundamental human tendency to the mating of male and female and the bringing up of children.").

<sup>113</sup> See *Framing Disability*, *supra* note 38, at 1415-16 & n.186.

<sup>114</sup> NYC DEP'T OF HEALTH, NO KIDDING PROGRAM, <http://www.nyc.gov/html/doh/teen/html/resources/no-kidding.shtml> (last visited May 15, 2014) ("The No Kidding: Straight Talk from Teen Parents program brings real teen moms and dads to schools throughout New York City to talk about the experience of raising a child, and to encourage teens to wait until they are adults to have children.").

<sup>115</sup> See Lucke, *supra* note 55, at 24 ("[T]he key to ethical practice is ensuring appropriately informed consent. If a woman wants to prevent pregnancy but finds it difficult to access contraceptive services, a nudge is ethical. In fact, it is not ethical to refuse to explore the potential benefits of nudges in helping to overcome barriers for vulnerable groups to access health services. The use of effective contraception is an important public health behavior. There should be no controversy in providing a nudge for an individual to engage in a health behavior (such as effective contraceptive use) if the individual wants to do it but finds it difficult to access services, for example, because of cost or fear of being judged.") (citation omitted).

<sup>116</sup> See *Freedom to Make the Right Choice*, *supra* note 48, at 67 ("These teens must be told, and in the name of their own empowerment. This means the 'choice' must appear to come from themselves and not from any authority. A baby, the teen's baby, not the mayor, conveys the 'hard-hitting facts.' The teen's baby, not the mayor, stresses that teen pregnancy is irrational and foolish. The baby, not the mayor, invites teens to join in criticizing the 'choice' of teen pregnancy as a deeply irresponsible course of action.").

of top-down, external imposition that has met criticism elsewhere.<sup>117</sup> Honest and open debate that includes women themselves, rather than the imposition of a one-way, top-down policy, better respects the importance of reproductive choices and of choosers' perspectives.

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<sup>117</sup> Cf. Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 767 (2010) (discussing efforts to ensure that a "municipal government does not itself initiate and impose a top-down rule set on an objecting community"); Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1201 n.236 (2005) (differentiating a program that "originated in a grassroots setting among police officers and local advocates" from one that "was conceived and implemented from the top down"); Rachel D. Godsil & James S. Freeman, *Jobs, Trees, and Autonomy: The Convergence of the Environmental Justice Movement and Community Economic Development*, 5 MD. J. CONTEMP. LEGAL ISSUES 25, 47 (1994) (praising efforts at "empowering local communities to reach solutions to local problems, rather than imposing 'top down' solutions on the community from the outside").